In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 752

JOHN A. GUZIAK, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

After full administrative proceedings, the Federal Trade Commission adopted its trial examiner's findings (R. 47–92) [1] that petitioner had made certain false and misleading representations in connection with his business of selling and distributing siding materials in interstate commerce, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (R. 96–99), and entered a cease-and-desist order (R. 93–95).[2]

[1] "R" refers to the record in the court of appeals. "CX" refers to Commission exhibits. "Tr." refers to the transcript of proceedings before the Commission.

[2] The Commission approved, with slight expansion, the hearing examiner's order (R. 93–99).

From 1960 until late 1962, petitioner operated the General Aluminum Company, a home siding business in South Nashville, Tennessee. Thereafter, he abandoned his Tennessee enterprise, moved to Little Rock, Arkansas, and set up another siding company, the Superior Improvement Company. He is president and sole stockholder of both corporations and has full control over their activities (R. 52).

The Commission found that petitioner made numerous misrepresentations to prospective customers in his advertising. He offered customers allowing him to use their homes as models of his siding work a "special discount price" and a $100 bonus for each sale resulting from a demonstration of the home. Only one demonstration occurred and no discounts or bonuses were ever given (R. 19–20, 57–58). By claiming to sell at factory prices or at cost, he suggested that he manufactured his own siding materials. At other times he implied that the materials he sold were manufactured by Alcoa, Kaiser and Reynolds, or that he had an affiliation with these companies. In fact, none of the materials he sold were manufactured by petitioner or by any of the companies named in his advertising, and he had no affiliation with any of those companies (R. 52–53, 82–92). He told customers that factory-trained men would perform the installation of the siding, when in fact petitioner's employees were locally recruited carpenters (R. 83–84). Finally, he represented that the siding materials were fully and unconditionally guaranteed, and, in some of his advertising, he offered a lifetime guarantee. Actually, pe-

titioner's guarantee was limited to the workmanship of the job, and even to this extent, as the numerous complaints from customer-witnesses revealed, he failed to honor his guaranty (R. 84–85).

The court of appeals, after carefully reviewing petitioner's contentions—substantially the same points he urges here—found them without merit and upheld the Commission's order (Pet. App. 11a–18a). There is no occasion for further review.

1. Contrary to petitioner's contention (Pet. 5), he operated in interstate commerce. At least three of his sales of aluminum siding in 1961, totalling more than $8,000, were made by his Tennessee company to customers in Kentucky (R. 54). He personally negotiated one of these contracts (R. 80–81, CX–44), and permitted his employees to deliver the materials from his South Nashville warehouse and to complete the work on the other two (R. 54–55). Many of his sales resulted from mailings of brochures and circulars by petitioner's wife from his home in Medford, Wisconsin, to homeowners in Tennessee and Arkansas;[3] interested purchasers would respond by returning self-addressed reply cards to petitioner's corporation at the Wisconsin address. He also published an advertisement in the *Nashville Tennessean*, a publication with a circulation in both Tennessee and Kentucky (R 56).

2. There is no basis for petitioner's contention that the court of appeals failed to examine the record to determine whether substantial evidence supported the

[3] Nineteen of the 32 witnesses against petitioner were solicited in this manner (R. 59–64, 66, 68, 72, 76–77, 79, 80–81).

Commission's findings. The initial decision of the hearing examiner clearly sets out the portions of the record relied upon to support each finding, and these findings were adopted by the Commission and properly reviewed and sustained by the court below (see Pet. App. 15a–16a).

3. Petitioner objects to the scope of the cease-and-desist order but fails to specify any respect in which the order is unrelated to the facts of the case. Examination of the order in the light of the findings plainly shows that it is directed to preventing petitioner from continuing the identical practices in which he previously engaged. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429–430.

4. Petitioner's challenge to the fairness of the procedures at the hearing is without merit. He charges that Commission counsel improperly coached witnesses and permitted them access to confidential investigative reports. The question arose when petitioner learned during cross-examination of a Commission witness that, prior to taking the stand, she had read the portion of an investigative report containing a summary of her statements made two years earlier to a Commission investigator (Tr. 443–445). Thereupon petitioner requested disclosure of the report and recall of all 28 previous witnesses to determine which of them, if any, had had similar access to such material. The examiner denied the request. He also denied petitioner's request that Commission counsel be compelled to testify about what material the prior witnesses had seen (Tr. 444–447). Before the close of that day's hear-

ing, however, Commission counsel stated unequivocally on the record that no previous witness had seen any investigative reports, and that only the four witnesses who had testified that day had had access to those portions of the reports containing a brief narrative of their own respective interviews (Tr. 522–525). The Commission disregarded the testimony of these four witnesses (R. 98).

The hearing examiner's refusal to recall witnesses long since excused and in many cases residing at great distances from the location of the hearing[4] was a reasonable exercise of his discretion. Moreover, it was not improper for Commission counsel to discuss anticipated testimony with prospective witnesses or to permit them to examine portions of public documents such as the official complaint. The testimony of the four witnesses who may have read the investigative reports was stricken from the record and had no effect on the Commission's decision. Petitioner has in no way demonstrated that the proceedings were unfair or that he was prejudiced by the examiner's procedural rulings.

5. Petitioner contends that this proceeding is not "in the public interest" under Section 5 of the Federal Trade Commission Act and therefore should have been dismissed. Of course, a proceeding under Section 5 must be in the public interest and not merely to vindicate private rights. *Federal Trade Commission*

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[4] Three days of testimony were taken in Little Rock, Arkansas and one in Nashville, Tennessee, before petitioner raised this question, in Nashville.

v. *Klesner*, 280 U.S. 19, 28; *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643; *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79, 83. But the validity of such a determination, which the Commission here made, has nothing to do with the number of witnesses called by the Commission, as petitioner suggests. The Commission's duty is to prevent "unfair methods of competition" and "unfair or deceptive acts or practices in commerce" (15 U.S.C. 45(a)(1); *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 384), and petitioner's business practices are precisely the sort that the Act condemns. It cannot seriously be argued that the Commission's effort to enjoin petitioner's deceptive solicitations is not in the public interest.

6. Finally, petitioner objects that the cease-and-desist order is directed against him individually and not against his corporations. But the Commission found that petitioner, as sole stockholder and director of the corporations, was their dominant and controlling force and therefore personally responsible for their activities. Furthermore, petitioner's practice of moving his operations from one location to another in the form of separate corporate enterprises without changing his mode of doing business justifies an order barring him personally from continuing his unlawful practices. See *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 119–120; *Gelb* v. *Federal Trade Commission*, 144 F. 2d 580, 581 (C.A. 2); *Goodman* v. *Federal Trade Commission*, 244 F. 2d 584, 593–594 (C.A. 9); cf. *Clinton Watch Company* v. *Federal*

Trade Commission, 291 F. 2d 838 (C.A. 7), certiorari denied, 368 U.S. 952.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966